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No. 86-563

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

ANTONIO CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROSE D. CIPOLLONE,
Petitioner,

vs.

LIGGETT GROUP, INC., A DELAWARE CORPORATION; PHILIP MORRIS INCORPORATED, A VIRGINIA CORPORATION; AND LOEW'S THEATRES, INC., A NEW YORK CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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The respondents have urged this Court *not* to consider the preemption issue now. They argue it is "premature" since "the lower Courts have [not] had the opportunity actually to apply

the legal standard enunciated by the Court of Appeals to the ambiguous and multifarious claims contained in petitioner's complaint." (*See* Br. in Opp. 16).

On December 9, 1986 the District Judge in *Cipollone* issued an opinion and order on remand, applying "the legal standards enunciated by the Court of Appeals," which articulated the extraordinary impact of the Third Circuit's opinion. *Cipollone v. Liggett Group, Inc.*, No. 84-678 (D.N.J. decided Dec. 9, 1986). A copy of that opinion has been provided to the Clerk of the Court.

The District Court agreed with the critics of the Third Circuit's opinion who have argued "that carried to its logical extreme [the decision] permits the tobacco industry to take out a full page advertisement declaring the Surgeon General to be wrong, urging that his warnings should be ignored, and claiming that smoking is safe without risking civil liability to anyone misled thereby." The court stated that in light of the broad, sweeping language of the Third Circuit's opinion, it had no alternative but to bar plaintiff's theories of liability based on the advertising and promotional campaigns of cigarette manufacturers which negated the mandated warnings and intentionally misled and deceived the consuming public. Judge Sarokin concluded that the decision of the Court of Appeals "clearly rejects" plaintiff's theory and makes "no distinction between the intentional, negligent, or good faith publication of such assertions. The opinion broadly holds that suits which challenge the propriety of a party's actions with respect to the advertising and promotion of cigarettes are preempted."

> Despite this court's vehement disagreement with that conclusion, it is duty bound to follow the dictates of a superior court. Therefore, according to the Court of Appeals, no matter how false or misleading cigarette advertising may be or have

> been, and even if intentionally so, no state law cause of action may arise on behalf of anyone who may have relied thereon to their detriment or death. Indeed, the tobacco industry evidently can continue to deny or refute the risks of cigarette smoking with impunity and immunity so long as the little rectangle with the necessary language appears on its advertising and on its cigarette packages. Faced with that mandate, the court has little difficulty in determining what is and what is not left of plaintiff's claims.

The District Court's opinion leaves little room for one to question the impact of the Third Circuit's opinion on the claims of persons injured by use of cigarettes and it demonstrates the potential for havoc the opinion creates in the products liability field in general by the reading of "implied preemption" into a statute when no evidence of congressional intent in that regard exists. Although certain of plaintiff's theories of liability remain intact, the core of plaintiff's claims has been stricken and, under the Third Circuit's opinion, the cigarette companies are immune from liability based on failure to adequately warn and their intentionally deceptive advertising practices.

The issue is not premature. Nor can the importance of the opinion from a precedential viewpoint be underestimated.

Respectfully submitted,

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